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724420—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ELLIOTT W. MICHENER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit directing the District Court for the District of Minnesota to vacate the second of two consecutive fifteen-year sentences imposed upon respondent in 1936 for violations of Section 150 of the Criminal Code (18 U. S. C. 264) on the ground that the two counts of the indictment on which the sentences were imposed charged only one offense.

OPINION BELOW

The opinion of the circuit court of appeals (R. 16–23) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under Section 150 of the Criminal Code (18 U. S. C. 264), the offense of causing a counterfeit plate to be made on or about August 25, 1934, is identical with the offense of possessing the same plate on or about that date and thereafter with intent to use it in counterfeiting government obligations.

STATUTE INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other

thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority

from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics added.]

STATEMENT

In 1935, respondent and a codefendant were indicted (R. 1–2) in two counts in the District Court for the District of Minnesota for violations of Section 150 of the Criminal Code (18 U. S. C. 264). The first count charged (R. 1) that on or about August 25, 1934, the defendants "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States" for the printing of a specified ten-dollar Federal Reserve note. The second count charged (R. 1–2) that "on or about August 25, 1934 and thereafter" the defendants unlawfully had the plate in their control, custody, and possession with intent to use it in counterfeiting described Federal Reserve notes. On May 12, 1936, respondent pleaded guilty and was sentenced on each count to imprisonment for fifteen years and to pay a fine of $5,000, the sentences to be served consecutively (R. 2–3).[1]

In 1941, respondent filed in the District Court for the Northern District of California a petition for a writ of habeas corpus, in which he con-

[1] It appears from the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171, 172 (see p. 6, *infra*), that at the time these sentences were imposed respondent was serving a thirty-five year sentence for forgery in the Wisconsin state prison. In 1939, after having served four years of the state sentence, he was released from state custody and surrendered to federal authorities to serve his federal sentences.

tended, *inter alia,* that the offense charged in the first count of the indictment embraced every element of the offense alleged in the second count and, therefore, he had been subjected to double punishment for one offense. On appeal from an order discharging the writ of habeas corpus, the Circuit Court of Appeals for the Ninth Circuit held, relying on its earlier decisions, that each count charged a separate offense. *Michener* v. *Johnston,* 141 F. 2d 171, 174.[2]

Thereafter, on March 26, 1946, respondent filed in the convicting court the present motion to vacate the sentence imposed on count 2 upon the ground previously urged in the district court in California, i. e., that both counts charged only one offense (R. 3–5). The motion was denied on April 22, 1946 (R. 10). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the order of the district court was reversed and the cause remanded to the district court with directions to vacate the judgment in respect of the second count (R. 23). The court below, expressly recog-

[2] The circuit court of appeals also pointed out that in any event respondent was not then entitled to be released, even though the sentence on the second count was considered void. The court remanded the cause to the district court for a specific finding on the issue of fact whether respondent had intelligently waived the right of assistance of counsel upon his arraignment on the indictment. The district court found that respondent did in fact intelligently waive his right in this regard, and that finding was thereafter affirmed by the circuit court of appeals. 146 F. 2d 129, certiorari denied, 324 U. S. 874.

nizing (R. 21–22) that its decision was in conflict with decisions of the Circuit Court of Appeals for the Ninth Circuit, held that every element of the offense of possessing a proscribed plate with intent to use it for counterfeiting was included in the offense of causing such a plate to be made. The court reached this result by invoking a doctrine of constructive possession which enabled it to conclude that during the period when the defendants were causing the plate to be made, they were constructively in possession of it. Accordingly, the court held that the evidence required to show that the defendants caused the plate to be made also showed that they possessed it.

SPECIFICATIONS OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the offense of causing a counterfeit plate to be made is identical with the offense of thereafter possessing the plate with the specific intent to use it for counterfeiting government obligations.

2. In holding that one who causes such a plate to be made is a possessor of it with the intent to use it for counterfeiting at the very time that he is causing another person to make the plate.

3. In holding that the sentences imposed were excessive and in directing that the sentence on count 2 be vacated.

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REASONS FOR GRANTING THE WRIT

The opinion of the Circuit Court of Appeals for the Eighth Circuit recognizes (R. 21–22) that "the conclusion which we have reached is in conflict with certain decisions of the Ninth Circuit, notably *Matthews* v. *Swope*, 111 F. 2d 697, and later decisions of that court which followed the doctrine of the earlier decision." Among the decisions of the Ninth Circuit with which the decision below is in conflict is a decision on the very indictment involved in this case, in which the Ninth Circuit held that each count charged a separate offense. *Michener* v. *Johnston*, 141 F. 2d 171, 174. Although the court below did not note the fact, its decision is also in conflict in principle with the decision of this Court in *Albrecht* v. *United States*, 273 U. S. 1, 11–12, and with decisions of the Second, Fifth, and Tenth Circuits to which we shall advert (*infra*, p. 14). In view of the conflict of decisions and in view of the importance of the decision below in the administration and enforcement of the criminal laws, particularly those contained in Chapter 7 of the Criminal Code, we submit that the question presented is an important one which should be resolved by this Court.

1. There is no question that Congress may punish separately each step leading to the consummation of a transaction which it has the power to prohibit, and may also punish the com-

pleted transaction. *Albrecht* v. *United States,* 273 U. S. 1, 11–12. It is likewise indisputable that Section 150 of the Criminal Code, upon which this prosecution was based, reaches each stage of the counterfeiting transaction from the making of the plate to the uttering of the counterfeit obligation by making it a separate offense to do any of the proscribed acts. In *United States* v. *Raynor,* 302 U. S. 540, 548, the Court was concerned with a different clause of Section 150, but after extensively reviewing the long legislative history of the statute, the Court stated:

> The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled "Offenses against the Currency." The provisions of this chapter were enacted to prevent and punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

The charges in this case of causing a proscribed plate to be made and of thereafter possessing it with intent to use it in counterfeiting government obligations are each founded upon a different clause of Section 150 and the legal elements of the offense described in each clause are different. Thus, to support count 1 the Government was

required to show that respondent (1) caused a plate to be made (2) in the likeness of a plate designated for the printing of obligations or securities of the United States. On the other hand, to support count 2, the Government was required to establish that respondent (1) had possession of the plate (2) with intent to use it for counterfeiting. The difference in the character of the legal elements is, we think, plain. The offense involved in count 1 contains no element of intent, and it reaches those who cause illegal plates to be made. The offense in count 2 requires that a specific intent be established, and it reaches those who, having that intent, possess plates which have been made. Each relates to a different step in the counterfeiting transaction.

2. The court below recognized (R. 18) that the two charges could involve different offenses, but it concluded that because both counts related to only one plate, the evidence necessary to support count 1 also would establish the offense charged in count 2, and that the two counts are thus factually identical. To reach this conclusion the court invoked a theory of constructive possession. Reasoning from the premise that the possession of the person who made the plate was in law the possession of respondent, the court held that evidence showing that respondent caused another to make the plate showed also that he possessed the plate at the same time. To satisfy the element of the specific intent required to support count 2,

the court reasoned that that intent was inferable from the fact that respondent caused the plate to be made.

We think that the court below erred in relying upon the fiction of constructive possession as a legal basis for its conclusion that the evidence which proved that respondent procured the plate to be made, likewise proved that he had it in his possession with the specific intent required by the statute in connection with the offense of possession. None of the decisions upon which the court relied as supporting a theory of constructive possession applied that theory in a context such as is involved in the present case. Apart from this fact, however, we think the basic misconception in the decision below is its failure to distinguish between cases in which one act is the foundation for more than one criminal charge,[3] and cases, such as this, where successive acts in one transaction are the basis for more than one criminal charge.[4]

[3] For examples, see *Gavieres* v. *United States*, 220 U. S. 338; *Blockburger* v. *United States*, 284 U. S. 299.

[4] This Court has rejected the double punishment argument in prosecutions for conspiring to commit an offense and for committing the offense, *Carter* v. *McClaughry*, 183 U. S. 365; see also, *Pinkerton* v. *United States*, No. 719, O. T. 1945, decided June 10, 1946; for agreeing to receive a bribe and for receiving it, *Burton* v. *United States*, 202 U. S. 344; for breaking into a post office with intent to commit larceny and for committing larceny at the post office, *Morgan* v. *Devine*, 237 U. S. 632; for cutting each mail bag, even though all were cut in the course of one transaction, *Ebeling* v. *Morgan*, 237

In the former situation, where the possession relied upon is merely an incident to another illegal activity such as making a plate, there may be some basis for arguing that there is no substantial difference between the two charges. See fn. 6, *infra*, p. 13, and see *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21 (App. D. C.) (concurring opinion). But where, as here, there is a sharply-defined illegal possession separate from a possession incident to the manufacture of the plate, it is plain that each is a separate step which is a crime in itself and is separately punishable.

As we read the indictment, count 1 relates to the causing of the plate to be made at a specified time and count 2 relates to possession of the plate after it was made, with criminal intent.[3] Each relates to a different step in the transaction. In our view, this factual picture cannot be distinguished from that in *Albrecht* v. *United States*, 273 U. S. 1, 11–12, in which this Court rejected a claim of double punishment where the defendant was separately sentenced for possessing liquor for

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U. S. 625; for sales on successive days to the same purchaser of a drug not in the original stamped package, *Blockburger* v. *United States*, 284 U. S. 299; and for possessing and thereafter selling the same liquor, *Albrecht* v. *United States*, 273 U. S. 1, 11–12.

[3] Respondent's plea of guilty to both counts of the indictment is, of course, an admission of the facts pleaded (*Steffler* v. *United States*, 143 F. 2d 772 (C. C. A. 7), certiorari denied, 323 U. S. 746; *Norris* v. *Hudspeth*, 114 F. 2d 1007 (C. C. A. 10)), and the identity of the offenses must therefore be tested in the light of the pleaded facts.

a period of time and for then selling the same liquor. Notwithstanding the fact that the proof of the sale must have shown that the defendant then possessed the liquor, the Court, speaking through Mr. Justice Brandeis, upheld the Government's position because the defendant was being punished for separate steps in the transacton.[6] Similarly, in this case, causing the plate to be made was one offense and possessing it thereafter with the required intent was another. Each was a successive step in the transaction and each involved a different evil at which Congress sought to strike. The fact that the same plate was

[6] The present case and the *Albrecht* case should be distinguished from the liquor cases relied upon by the court below to support its conclusion (R. 18–20). In each of those cases, the facts show that on a given day government agents raided a designated place and found an illicit still in operation. On the basis of these facts the defendants were charged with illegally possessing equipment to manufacture liquor, with contemporaneously possessing the liquor and with at the same time manufacturing the liquor. The decisions relied upon by the court held that proof of manufacturing also proved that the defendants at the same time possessed the equipment and the liquor. The situation would have been different, we think, if the cases involved successive acts in the transaction. If the charges were that on a fixed date the defendant manufactured liquor and for a time thereafter he possessed it, there would be a proper basis for two sentences, as in the *Albrecht* case, where possession and then a sale of the same liquor supported two sentences. The difference is between a possession which is a mere incident to the manufacturing or selling and a sharply defined possession which continues for some time and is separable from the act of selling or manufacturing.

involved in both counts is of no greater significance than the fact in the *Albrecht* case that the same liquor was first possessed and then sold.

3. As we have said, the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in passing on respondent's earlier habeas corpus case, *supra*, and with an earlier decision of that court, *Matthews* v. *Swope*, 111 F. 2d 697. It is likewise in conflict in principle with *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9), where the defendant was sentenced separately for manufacturing a mold for the making of fifty-cent pieces and for possessing the mold; with *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note; with *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; with *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549; *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. C. A. 10); and *Curran* v. *Sanford*, 145 F. 2d 229 (C. C. A. 5), which involved separate sentences for possessing counterfeit coins and passing them.

4. If the decision below is allowed to stand, respondent and his codefendant will be entitled to

have the fifteen year sentences and the $5,000 fines imposed under count 2 vacated. Other persons serving sentences for violations of Section 150 or the related provisions in Chapter 7 of the Criminal Code will likewise be in a position to challenge successfully the imposition of two sentences where they have been convicted on separate counts for possessing and selling or possessing and manufacturing or possessing and uttering proscribed matter as separate steps in one criminal transaction. The novel decision below thus presents an important question which, we submit, merits consideration by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1946.

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